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In the Supreme Court of the United States, JR., CLERK

OCTOBER TERM, 1973

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL NO. 17, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519 29 U.S.C. 151, *et seq.*):
Section 8(b)(1)(B) 2, 6, 8
Section 10(a) 8, 9

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OPINIONS BELOW

The court of appeals rendered no opinion. The Board's decision and order (Pet. App. B 25-35) are reported at 199 NLRB No. 26.

JURISDICTION

The decree of the court of appeals, adopting the Board's decision and enforcing its order, was entered on October 18, 1973 (Pet. App. A 24). The petition for a writ of certiorari was filed on January 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that erection supervisor Ziltener was a management representative whose employment conditions were not covered by the collective agreement, rather than a "working foreman," and that therefore the Union violated Section 8(b)(1)(B) of the National Labor Relations Act by striking to compel the company to pay Ziltener in accordance with the agreement and by fining him for working for less compensation than the union deemed proper.

2. Whether, in the circumstances of this case, the Board was reasonable in declining to defer to arbitration proceedings invoked by the parties.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 158, *et seq.*), are set forth at pp. 3-4 of the petition.

STATEMENT

A. The Board's Findings of Fact

In November 1969, George Koch Sons, Inc. (the Company), a contractor with home offices in Evansville, Indiana, was constructing an addition at a General Motors plant in Framingham, Massachusetts (Pet. App. B 26, 39). The Company employed a work force of 150, composed of at least four crafts—sheet metal workers, pipefitters, electricians, and ironworkers (Pet. App. B 26; A. 52-53, 62).[1] The work was performed by crews

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[1] "A." refers to the appendix to the briefs in the court below.

of 4 to 12 men, each led by a foreman who functioned as a "lead man" (A. 52, 63, 154, 168-169). Employment conditions of the sheet metal workers were governed by a local area agreement between petitioner Local No. 17 (the Union) and the Roofing and Sheet Metal Contractors Association, which covered "foremen" and provided that they were to be compensated according to the size of their crew (Pet. App. B 28, 41-42, n. 4; A. 370, No. 16).

On November 11, 1969, after negotiations with the Company's home office, David Ziltener, a member of Sheet Metal Local No. 416 in Janesville, Wisconsin, was hired as erection supervisor at the Framingham project (Pet. App. B 26-27, 40-41; A. 231-234, 356). A Company vice-president had previously interviewed Ziltener in Janesville and told him that he would be working as "a manager or a superintendent in a management department" and would "have to make up [his] mind what kind of salary [he] would have to have" (A. 233). Ziltener proposed $285 per week plus $20 per day living expenses, or a total of $425 per week, which the Company accepted (Pet. App. B 26-27, 41; A. 233-234, 258, 356).

George Thompson, a general projects supervisor for the Company, was in charge of the Framingham project (Pet. App. B 27, 41; A. 44-45). Ziltener was "second in command," and was in charge when Thompson was not on the jobsite (Pet. App. B 27; A. 47, 60, 311, 317, 327-328).

Ziltener and Thompson were the only men on the job who were paid directly from the Company's home office in Evansville (A. 213, 221-222). Ziltener attended meetings which Thompson held with the general foremen for the various crafts (Pet. App. B 27; A. 236-237, 277). Also, once or twice a month, management meetings

regarding the project were held with Vice President Kaufman, Installation and Service Manager Terry Dishman, and occasionally owner Bob Koch. Ziltener attended these meetings with Thompson, and participated actively in the discussions of personnel, job assignments, programming of the work, and how the work was to be done (Pet. App. B 27; A. 55-56).

Ziltener advised General Supervisor Thompson as to the suitability of employees for particular job assignments (A. 56), spoke to foremen about employees "taking too long coffee breaks" and otherwise "goofing off" (A. 243), and had authority to grant time off and to adjust grievances (A. 60, 63-64, 80). On one occasion, at Ziltener's recommendation and after discussions with Union representatives in which Ziltener participated, the general foreman for sheet metal work was discharged (Pet. App. B 27; A. 59, 242-244). Ziltener was also responsible for negotiating and settling a jurisdictional dispute which arose on the jobsite at a time when Thompson was in Indiana (A. 311-312).

On July 6, 1970, the Company discharged Ziltener (Pet. App. B 28; A. 246-247). He went to Union representatives and complained that the Company had failed to pay his pension and welfare contributions, as he claimed it had agreed orally to do (A. 248-249, 261). While considering Ziltener's grievance, the Union learned that his pay as erection supervisor had been less than the Union contract provision for foremen's wages (A. 176).

The Union demanded that the Company pay Ziltener the difference between what he had received and what a foreman would have received under the contract (A. 87-90, 176-179). When the Company failed to pay Ziltener the back wages and other benefits which the Union claimed were owed him, the Union called a strike of the

Company's sheet metal workers to compel such payment (A. 176-178). To stop the strike, the Company gave the Union checks for Ziltener's claimed backpay and benefits, and also paid the employees for the two days they were on strike (A. 89-91).

On August 17, Union Business Representative Riley filed charges with the Union against Ziltener, alleging that, in contravention of Article 17 of the Union's Constitution, he had violated "the established union collective bargaining agreements * * * relating to rates of pay, rules and working conditions"—by working in Boston for less than Boston wages, working over 40 hours when paid only for 40, and having no health, welfare and pension contributions paid on hours worked (Pet. App. B 29; A. 391). Ziltener was found guilty of the charges and fined $1,500, which he subsequently paid (Pet. App. B 29; A. 169-170).

The Company filed an unfair labor practice charge with the Labor Board. It also filed with the Local Joint Adjustment Board, established under the contract between the Union and the Roofing and Sheet Metal Contractors Association, a grievance alleging that the Union's strike violated the no-strike clause of the contract because Ziltener was a supervisor and not covered by the contract (Pet. App. B 29; A. 373-374). The Union countered with a grievance charging that the Company had violated the contract (Pet. App. B 29; A. 375). On January 1, 1971, the Local Board ruled that Ziltener had come into the Union's jurisdiction as a sheet metal worker and therefore was entitled to sheet metal worker's wages for all hours worked (Pet. App. B 29; A. 383-384). Minutes of the Local Board indicate that this finding was based upon the testimony of Union Steward Dowd that Ziltener "worked * * * with the tools and * * * took orders from * * *

the job foreman" (A. 382). The Company appealed this determination, but as of the time of the Labor Board hearing there had been no decision on the appeal (Pet. App. B 29; A. 386-389).

B. The Decisions Below

The Board rejected the Union's contention that Ziltener was an employee whose working conditions were covered by the collective bargaining contract under the provisions relating to "foremen" (Pet. App. B 27, 32). The Board found that Ziltener was not a foreman covered by the contract, but rather a supervisor who was "the Employer's representative 'for the purpose of collective bargaining or the adjustment of grievances' within the meaning of Section 8(b)(1)(B)" of the Act (Pet. App. B 28). Accordingly, the Board concluded that the Union's action in striking and in disciplining Ziltener was an effort to dictate to the Company the terms under which it could hire a management representative, and thus violated Section 8(b)(1)(B) of the Act (Pet. App. B 30).

The Board also rejected the Union's contention that it should have deferred decision pending resolution of the Local Joint Adjustment Board proceedings. The Board, finding that the collective agreement contained no "exclusion from coverage of statutory 'supervisors'," concluded that it was unlikely that "an arbitrator, in determining whether or not Ziltener was working at a position intended to be covered by the agreement, would be considering the issue which we are called on to decide—*i.e.*, Ziltener's status as an 'employee' or 'supervisor' as defined in the Act * * * " (Pet. App. B 32). The Board added (Pet. App. B 32-33):

> * * * [S]ince we are in any event required to take jurisdiction in order to determine the issue of whether the fine was violative of our Act, there

> seems less reason to defer the other issue raised by the complaint; namely, the Union's conduct with respect to the strike. When an entire dispute can adequately be disposed of under the grievance and arbitration machinery, we are favorably inclined toward permitting the parties an opportunity to do so. One of our reasons for so doing is to avoid litigating the same issues in a multiplicity of forums. But here, since we must perforce determine a part of the dispute, there is far less compelling reason for not permitting the entire dispute to be resolved in a single proceeding.

The Board ordered the Union, *inter alia*, to rescind Ziltener's fine and to reimburse the Company for the back wages and strikers' pay which had been obtained from it (Pet. App. B 34).

The court of appeals upheld the Board's decision and enforced its order (Pet. App. A 24).

ARGUMENT

1. The basic issue presented by the petition—whether, when an employer voluntarily agrees to have the wages and working conditions of certain supervisory personnel determined by the collective bargaining agreement, the union is free to strike to enforce such contractual provisions and to fine non-conforming supervisors—is not presented on this record. For the Board found that Ziltener was not a "foreman" covered by the bargaining contract and that the Company had not contemplated or intended that his working conditions be subject to bargaining. It therefore rejected the Union's contention (Pet. 4) that it was merely attempting "to enforce its collective bargaining contract" and concluded, instead, that the Union was attempting to coerce the Company into agreeing to the Union's terms concerning the working condi-

tions of a management representative. To strike an employer for selecting a supervisor under employment conditions which the union disfavors tends to restrain the employer in his choice of a representative, in violation of Section 8(b)(1)(B) of the Act. See *International Typographical Union Local 38* v. *National Labor Relations Board,* 278 F. 2d 6, 12 (C.A. 1), affirmed by an equally divided Court, 365 U.S. 705. Similarly, to fine one who agrees to serve as the employer's representative under conditions disfavored by the union likewise "must necessarily have an inhibiting effect—and indeed a coercive effect—on the employer in his future selection of representatives" (Pet. App. B 30).[2]

Thus, the only issue actually presented here is whether substantial evidence supports the Board's finding that Ziltener was not a working foreman covered by the collective agreement, as petitioner contends (Pet. 5), but rather was the "second in command" to General Superintendent Thompson (Pet. App. B 27). Such an evidentiary issue does not warrant further review. In any event, as shown in the Statement (*supra,* pp. 3-4), the Board's finding is amply supported by the record.

2. There is no merit to petitioner's contention (Pet. 20-22) that the Board should have deferred to the decision of the Local Joint Adjustment Board. Section 10(a) of the Act provides that the Board is "empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce" and that "[t]his power shall not be affected by any other means of ad-

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[2] *Illinois Bell* and *Florida Power* (Pet. 17, n. 23), Nos. 73-795, and 73-556, petitions for certiorari granted January 21, 1974, involve an entirely different question—*i.e.,* whether it is a violation of Section 8(b)(1)(B) for a union to discipline a supervisor for performing rank-and-file work during a strike.

justment or prevention that has been or may be established by agreement, law, or otherwise * * *." 29 U.S.C. 160(a). It is clear that "the Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts." *National Labor Relations Board* v. *Strong Roofing & Insulating Co.*, 393 U.S. 357, 360-361, citing *Smith* v. *Evening News Association*, 371 U.S. 195, 197-198. It is equally clear that a Board decision takes precedence over a contrary arbitral award. *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 272.

The Board, of course, has discretion to defer to the arbitral process and has long done so where the parties have submitted the dispute to a fair arbitration proceeding and have obtained an award which is not repugnant to the policies of the Act. See, *e.g.*, *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082. Cf. *Collyer Insulated Wire*, 192 NLRB 837. The Board did not abuse its discretion in declining to do so here, since the arbitration proceeding did not determine all of the issues involved in the unfair labor practice proceeding (*supra*, p. 7).

3. The final issue raised in the petition—whether the Board properly ordered the Union to recompense the Company for the strikers' wages—is not properly before this Court since petitioner failed to raise it in the court of appeals. See *Duignan* v. *United States*, 274 U.S. 195, 200; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. In any event, such a remedy was a proper exercise of the Board's broad remedial authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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